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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1953.

No. 448

EDWARD A. PETERMICHL,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable The Supreme Court of the United States:

The petitioner, Edward A. Petermichl, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above case, which judgment was entered on June 29, 1953 (R. 117), and became final, upon the denial by that court of petitioner's application for a rehearing, on August 4, 1953. (R. 136)

I.

Opinion Below.

The opinion of the Court of Appeals is reported in in 205 F. 2d 434; it will also be found at R. 112-117, and is attached as an appendix to this petition.

II.

Jurisdiction.

This Court's jurisdiction is invoked under 62 Stat. 928, 28 U.S.C. Sec. 1254 (1).

III.

The Questions Presented.

1. May the Court of Appeals, in reviewing a judgment for the defendant on a directed verdict, weigh the evidence, interpret it unfavorably to the plaintiff, and disregard vital portions of it?

2. Did the Court of Appeals err in holding as a matter of law that petitioner was contributorily negligent, that there was no evidence of wilful and wanton conduct on the part of respondent, and that evidence of the custon and practice of boarding and operating respondent's trains was inadmissible?

IV.

Summary and Short Statement of the Matter Involved.

Petitioner lost both legs above the knee when he was thrown under respondent's passenger train by a sudden rapid acceleration in its speed while he was standing on the lower step of one of its coaches a few seconds after having boarded it as it moved slowly out of the

station. He brought his action for damages against respondent in the state court, from which it was removed to the District Court on respondent's petition on the ground of diversity of citizenship. It was there tried three times, and partially tried a fourth time, on each occasion before a different judge. The first two juries found for petitioner, and the third jury disagreed. New trials were granted after the first two trials, on the ground of the inadequacy of the damages awarded. At the close of petitioner's evidence on the fourth trial, the trial judge directed a verdict for respondent, on which he entered judgment (R. 2), on the ground that petitioner was contributorily negligent as a matter of law, and that there was no evidence of wilful and wanton conduct on the part of respondent. The Court of Appeals affirmed.

The juries on the first three trials found specially that petitioner was contributorily negligent (R. 109) and the verdicts in the first two trials necessarily represented a finding that respondent was guilty of wilful and wanton conduct, as to which contributory negligence was not a defense. The judges in the first three trials, in which the evidence differed in no material respect from that in the fourth trial, left the issues of negligence, contributory negligence, and wilful and wanton conduct to the jury.

Petitioner, a healthy, athletic 45 year old man (R. 32, 33) regularly commuted to his work in downtown Chicago on respondent's trains, which he boarded every morning at the same time at a station about a block from his home. On the morning of the accident, although he had left home at the usual time, the train came in before he reached the station, and he made a run for

it. (R. 34, 35) When he was half way up a stairway leading to the station platform, or about 65 or 70 feet from the train, it began to pull out. (R. 36) When he reached the train the open rear entrance of the fifth car (R. 60)—it was a seven car train moving from right to left as he approached it—came opposite him, he took a couple of steps in the direction it was going (R. 54), grasped the left or forward handhold with his left hand, and stepped onto the bottom step. In his right hand he carried a small leather lunch case weighing a couple of pounds, and two large envelopes. (R. 58) When he stepped on, about 50 feet from the end of the station platform (R. 60), the train was going five or six miles an hour (R. 37, 38), was accelerating, and had moved about a car length. (R. 59, 61) Just beyond the station platform, and running alongside the track on the platform side, was a steel girder maintained by respondent as part of a viaduct which supported its tracks. The clearance between the top of the girder and passing trains was about 10 inches. (R. 20-22)

Petitioner testified that he got upon the lower step in safety with both feet and, holding the left handhold (which was a little more than two inches outside the body of the car, R. 21) with his left hand, rode in that position for several seconds (R. 37, 38, 41); that in this position, standing upright, only his left arm, which was somewhat behind him, a part of his left shoulder and possibly an inch or two of his buttocks were outside the coach (R. 56, 57); that at the moment he was about to step up to the next step the train accelerated and swung him around; that the acceleration was sudden and unusually rapid and caught him off guard (R. 38, 41, 42), swinging him outward from the safe position in which he was standing, so that he struck the girder

and fell under the train, where his legs were run over. Fred Hieber, a passenger sitting in the third seat from the rear of the car petitioner was boarding, testified that immediately before it reached the bridge (girder) he "noticed the train had a terrific pickup." (R. 84)

On numerous occasions during the several years that petitioner had been taking this train he had boarded it while it was moving slowly out of the station, under circumstances substantially similar to those on the occasion in question, and had always done so safely and without objection or remonstrance from the trainmen, one or more of whom had always seen him get on, and had always taken his fare and accepted him as a passenger. (R. 40-43) Respondent's rule required its trainmen to stand upon the lower steps of the coaches as the train pulled out of the station (R. 95), but petitioner saw none of them there as he ran toward and boarded the train the morning of the accident. (R. 41, 86, 89) Mann, a passenger, testified that when he boarded the train at the station in question the rear trainman was inside the last car. (R. 76)

Petitioner offered to prove that both men and women customarily boarded respondent's trains while they were moving slowly past the station platform, with the knowledge and consent of the trainmen, and that they were always accepted as passengers; that it was the practice and custom of respondent always to move its trains slowly past the station platform, and not to accelerate them rapidly, until the last coach had passed the girder adjacent to the platform; that the boarding of respondent's slowly moving trains, with the knowledge and consent of the trainmen, was frequent and had been the practice and custom for years. Petitioner offered to

prove the custom, which pertained to the boarding and movement of trains at that station, at the time of the morning petitioner was hurt, by five or six witnesses, both men and women. (R. 27, 30) All of this evidence was excluded. (R. 31, 40)

V.

Reasons Relied On for the Allowance of the Writ.

We contend that the facts briefly stated above would support a verdict for petitioner on the issues of negligence, contributory negligence, and wilful and wanton conduct; that the Court of Appeals, as had the District Court, weighed the evidence, construed it unfavorably to petitioner, and rejected important parts of it; that in so doing it violated fundamental principles of review, and effectively deprived petitioner of the right of trial by jury guaranteed to him by the Seventh Amendment. We think this decision represents an encroachment upon the proper function of a jury serious enough to warrant the exercise of this Court's supervisory powers.

This decision is in conflict with the Court of Appeals' own recent decision in *Fiedler* v. *Chicago and North Western Railway Company*, 204 F. 2d 515, 516, 517.

The holding that there is no evidence of wilful and wanton conduct on the part of respondent is contrary to the controlling Illinois law.

The Court of Appeals in the Seventh Circuit appears to have adopted the practice of weighing evidence in negligence cases in which it feels a verdict for plaintiff would not be desirable. In its recent decision in *Spikings* v. *Wabash R. Co.*, 201 F. 2d 492, 495 (7th Cir.) it reversed a judgment for the plaintiff in a crossing

case on the ground that the evidence for the plaintiff had been "obliterated" by the positive testimony of defendant's witnesses. This decision and that in the instant case are examples of what is described by Mr. Justice Black in *Galloway* v. *United States,* 319 U. S. 372, 397 as "the gradual process of judicial erosion which in one hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." The Court of Appeals may feel that more just results may be obtained by this method, but we submit it is in clear violation of the constitutional right of trial by jury.

The right of trial by jury guaranteed by the Seventh Amendment is to be jealously guarded by the courts, and a jury's function is not to be usurped in close cases. *Jacob* v. *New York,* 315 U.S. 752, 756. The right of jury trial cannot be cut off if litigants really have issues to try, even though the court may be motivated by a desire to end protracted litigation. *Sartor* v. *Arkansas Gas Corp.,* 321 U.S. 620, 627.

In Green, Contributory Negligence, 39 Ill. L. Rev. 116, 121, in an article written in 1944, it is said:

> "But it is believed that of the suits instituted [in Illinois], more are being denied jury trial, and a larger percentage of those in which verdicts are found for plaintiffs are being reversed, *than in any other American jurisdiction.* (Emphasis added.)

This state of affairs has not materially improved since 1944, and we respectfully contend that it justifies the exercise by this Court of its supervisory powers in cases, such as this one, in which fundamental principles of review have not been observed. It may be too late now,

as this Court said in *Galloway* v. *United States,* 319 U.S. 372, 389, to urge that the Seventh Amendment deprives a federal judge of the power to direct a verdict, or otherwise to substitute his judgment for that of a jury on fact issues, but the power has been seriously questioned, and at best rests on insecure foundations. Mr. Justice Black's dissent in *Galloway* v. *United States,* and Hackett, Has a Trial Judge of a United States Court the Right to Direct a Verdict?, 24 Yale L. J. 127. We submit that verdicts should be directed, if at all, only where "there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy." Galloway, at 407. Viewed in the light of these principles, the decision in this case represents a gross miscarriage of justice.

This Court has frequently held that wherever facts are in dispute or the evidence is such that fairminded men may draw different inferences an appellate court's function is exhausted when it appears that there is a reasonable basis in the evidence for the jury's conclusion. It may not weigh the evidence, draw contrary inferences, or determine that a different conclusion would be more reasonable. *Lavender* v. *Kurn,* 327 U.S. 645, 653; *Ellis* v. *Union Pacific R. Co.,* 329 U.S. 649, 653; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U.S. 54, 67, 68; *Tennant* v. *Peoria and P.U.R. Co.,* 321 U.S. 29, 35. And similarly, peremptory instructions should not be given in negligence cases where fairminded men could draw different inferences from the facts. *Stone* v. *New York C. and St. L. R. Co.,* 344 U.S. 407, 409; *Wilkerson* v. *McCarthy,* 336 U.S. 53, 62; *Richmond and Danville R. Co.* v. *Powers,* 149 U.S. 43, 45. In determining whether a verdict was properly directed for a defendant, the appellate court may look only to the evidence and reasonable in-

ferences tending to support the plaintiff's case. *Wilkerson* v. *McCarthy* at p. 57. These principles are just as applicable to common-law actions for damages under the federal courts' diversity jurisdiction as they are to those involving the Federal Employers' Liability Act. *Pa. R. R.* v. *Goldie,* 182 F. 2d 9, 12 (6th Cir.)

Summary of Argument.

The Court of Appeals disregarded or rejected the evidence that petitioner had gotten onto the step in a safe position and that he was thrown from the train by a sudden rapid acceleration in its speed which occurred after he had ridden safely on the step for almost a car length; implied that the train was accelerating rapidly when he boarded, and that such acceleration threw him off, or that he was brushed off by the girder before he got completely onto the step, although petitioner's evidence clearly refutes both these suggestions; and implied that as he was right-handed he should have used that hand in boarding the train, in disregard of its holding in a previous case that such was an improper way to board, and of the obvious fact that petitioner boarded in the only natural and proper way—by grasping the left or forward handhold with his left hand. The proper way to board a moving train is the sort of fact question juries are peculiarly fitted to decide, and the Court's implication in this regard is illustrative of its usurpation of the jury's function in this case.

The Court of Appeals ignored or rejected the most important element of petitioner's proposed proof of the custom of boarding respondent's slowly moving trains; that is, that respondent affirmatively showed its concurrence in the custom by always operating its trains slowly past the station platform and girder with the car steps and platforms open and unguarded, not accelerating them rapidly until the last car had passed the girder; misconstrued the Illinois rule on admissibility of custom announced in *North Chicago Street R. R. Co.* v. *Kaspers*, 186 Ill. 246, 57 N.E. 849, and *South Chicago City Railway*

Co. v. *Dufresne*, 200 Ill. 456, 65 N.E. 1075; upheld the exclusion of the custom notwithstanding evidence of custom was held admissible in its own decision in *Fiedler* v. *Chicago and North Western Railway Company*, 204 F. 2d. 515, 516, 517, which is indistinguishable in principle from this case; and summarily held without discussion that there was no evidence of wilful and wanton operation of the train—again in disregard of the most important elements of petitioner's proof, and of the controlling Illinois decisions.

The Court of Appeals disregarded or rejected the most favorable elements of petitioner's proof, and in so doing deprived him of his constitutional right of trial by jury.

The writer of the opinion below on oral argument, had expressed doubt that a seven-car train could be accelerated rapidly, and inquired whether expert evidence that it could had been introduced. It had not, of course, been introduced in petitioner's case in chief, at the close of which the verdict for respondent had been directed. It had been introduced in rebuttal on a former trial. At page 2 of the Court's opinion (R. 113) it is said: "Plaintiff's body came in contact with the steel girder, causing him to fall. * * * " There is no mention in the opinion of the evidence that his body was thrown around against the girder by the "sudden" and "unusually rapid acceleration" of the speed of the train as the rear platform of the coach which he had boarded in safety approached it (R. 38, 42); or of the evidence that there was a "terrific pickup" in the speed of the train "immediately before it reached the bridge". (R. 84) It is apparent that this vital proof was rejected.

This is further shown by the Court's twice referring (R. 113, 117) to the fact that the train was accelerating in speed at the time petitioner got on, the implication being that the rate of acceleration which threw him off the train was in progress at the time he boarded. This was unwarranted and refuted by the testimony that petitioner rode safely on the step for almost a car length, and that it was the sudden, violent acceleration which occurred at that point that swung him against the girder. Any previous acceleration during the time he was boarding, or riding on the step, must necessarily have been slight. This reasonable interpretation of the evidence favorably to petitioner was not adopted by the Court. The whole import of the decision is that petitioner was either thrown off by the normal acceleration of the train, or was brushed off by the girder as he was trying to get onto the first step—the latter in disregard of the evidence that as petitioner rode on the step only his left arm, with which he grasped the handhold, was outside the car, and that the only mark on his body after the accident was a bruise on his right hip—all of which showed that he could not have been brushed off by the girder but must have been swung against it. It is perfectly clear that in boarding the left side of the train as petitioner did he was facing partly in the direction the train was moving, and the left side of his body would have been farther from the side of the coach than his right side, and would have come in contact with the girder, if he had not been completely on the step. In the safe position on the step which the uncontradicted evidence shows he occupied, it would have been a physical impossibility for him to come in contact with the girder.

In holding (R. 113) that the case was controlled by its own decision in *Swigart* v. *Chicago and N. W. Ry. Co.*,

180 F. 2d 177, and that petitioner's conduct in the instant case was even more reckless than Swigart's (R. 114) the Court ignored vital differences in the two cases. Swigart attempted to board the train at night from a dark and unlighted platform by grasping the forward handhold (the train was moving from right to left) with his *right* hand, which was plainly the most awkward and dangerous way imaginable in which to attempt to board. That the Court so recognized appears from its statement in that opinion (180 F. 2d at 180): "After taking hold of the lefthand grab iron with his right hand, it was quite natural that the momentum of the train would swing him around with sufficient violence to break his hold and cause him to fall." The encumbrance of Swigart's left arm by his topcoat and package led him to adopt an obviously dangerous and difficult method of boarding. Petitioner, on the contrary, boarded in the only natural and proper manner; by grasping the left handhold with his left hand.

There was no evidence in the *Swigart* case of a custom of boarding trains as they moved out of the station, or of operating them slowly past the station, such as petitioner offered, and the trainmen had no notice that Swigart would attempt to get on the train. Petitioner's train was going no faster than a brisk walk when he boarded, and he had no reason to expect a rapid acceleration before he reached the interior of the car. He had every reason to believe, both because of his own experience and the customary operation, that he had ample time to ascend the car steps.

The Court's statement (R. 113) that petitioner is right-handed and had that hand encumbered at the time clearly implies that he should have used his right hand in boarding and that his failure to do so made him more reckless than

Swigart. This is in complete disregard of the proper method of boarding and of the evidence that petitioner rode safely upon the step for almost a car length. This and the adoption (R. 115) of the trial judge's statement, without elucidation, that petitioner's testimony revealed a pattern of obviously dangerous conduct, plainly shows that the Court has rejected petitioner's entire theory of the case.

It is common knowledge that any moderately athletic individual with reasonably good muscular coordination can board a train moving at five or six miles an hour without difficulty from a dry, level platform in broad daylight. Petitioner did so easily, as he had many times before, at a point about 50 feet from the end of the platform. There was no such obvious danger in his conduct as would justify the court in directing a verdict for respondent.

The Court of Appeals erred in holding the evidence of custom inadmissible.

The Court of Appeals upheld the trial court's exclusion of petitioner's proposed proof that men and women customarily boarded respondent's trains as they moved slowly out of the station, with the knowledge and consent of the trainmen, were always accepted as passengers without admonition or rebuke, and that the trains were always operated slowly past the platform and adjacent girder. The exclusion was on the ground of an a priori condemnation of the practice of boarding moving trains as reckless, and of what it regarded as the Illinois rule as expressed in *North Chicago Street R.R. Co.* v. *Kaspers*, 186 Ill. 246, 57 N.E. 849, and *South Chicago City Railway Co.* v. *Dufresne*, 200 Ill. 456, 65 N.E. 1075, both of which are said to hold that evidence of the custom is

inadmissible unless it is coupled with acts of encouragement and invitation by the carrier, such as exhortation to board, or manual assistance in doing so, amounting to active inducement of the practice. An examination of these cases discloses that concurrence in the custom is enough, and need not take the form of active inducement, although it happened to do so in the Kaspers case. In that case the court said (186 Ill. 246, 249, 57 N.E. 849, 850-851), that "if the defendant knew that persons would probably be getting on the moving trains at that place and consented to the practice, the law imposed upon it the duty to not expose the plaintiff to unnecessary danger in adopting the practice, and to manage the train accordingly."

In the *Dufresne* case (200 Ill. 456, 460-461, 65 N.E. 1075, 1077) the court said: "To bring the case within the rule stated [in *Kaspers*] there must be some concurrence by the railroad company in the practice, and not a mere failure to prevent acts of negligence or to compel the public to use prudence and caution for their own safety * * * The defendant being compelled to pass over these several systems of tracks in the manner it did, there could be no inference that the speed was reduced to enable passengers to get on, and the evidence wholly failed to show any concurrence in the custom." There was far more in the instant case than a mere failure to prevent persons from boarding the moving trains. Respondent actively showed its concurrence in the custom by always operating its trains slowly past the platform, not accelerating them appreciably until the last car had passed the girder. This was probably the most important part of the excluded proof, and the railroad's practice in this regard was just as effective an inducement to board, when coupled with

the consent of the trainmen, as any exhortation or offer of manual assistance might have been. The Court of Appeals is completely silent about this, and the inference is inescapable that the Court has ignored or disregarded the part of the proposed offer that would make it admissible under the *Kasper* and *Dufresne* cases. In so doing it has eliminated proof which, above anything else, would make the case one for the jury.

We contend that the Court of Appeals, as well as the trial judge, was required to accept this proposed proof at face value, as long as it was not contrary to some natural law. To permit the Court to reject a part of it and then to hold the remainder inadmissible under a local rule of law is again to permit the Court to weigh the evidence, construe it unfavorably to the proponent, and to substitute its judgment for that of the jury on questions of fact.

Respondent accepted the financial benefits resulting from the observance of the custom in question, and owed a duty to petitioner to operate the train in accordance with it. Petitioner had a corresponding right to rely on the performance of this duty, and to govern his conduct accordingly. The rule is almost universal that evidence of custom is material on the issues of negligence and contributory negligence. The exclusion of the proof of custom in this case resulted in a denial of petitioner's right of trial by jury.

The Court of Appeals was impressed (R. 116) by counsel's statement, in his offer of proof, that passengers boarded moving trains *apparently* (the Court's emphasis) with the knowledge and consent of the trainmen. The use of the word 'apparently' was either inadvertent or intended in the sense of 'obviously'. When the en-

tire offer of proof (R. 31,40) is considered there can be no doubt that it was intended unequivocally to show that the trainmen never made the slightest objection or remonstrance, but always accepted persons so boarding as passengers and took their fares. Petitioner's experience had been the same. (R. 40-43) The offer was plainly to prove knowledge and consent—not apparent but real—on the part of the trainmen.

The Court's holding on the question of custom is in conflict, in principle, with its recent decision in *Fiedler* v. *Chicago and North Western Railway Company*, 204 F. 2d 515, 516, 517. The Court there said, at pages 516, 517:

> "It is apparent from the testimony in this case that, as the train approached the station at which they were going to get off, passengers customarily went out on the platform of the coach before the train stopped. It is also apparent that, in spite of the sign on the coach door warning against passengers being on the platform before the train stopped, the defendant's employees not only did not object to this practice but also indulged in it themselves, as shown by the fact that two of the employees were on the platform of the coach when this accident occurred • • •
>
> "At the time of the accident the plaintiff was holding on to one of these handholds. He did not remember which one. Under these circumstances it would appear that there would have been no real danger to the plaintiff as he stood on the steps of the platform holding on to a steel bar, except for the negligence in the operation of the defendant's train.
>
> "Since the plaintiff was a regular passenger on this same train we may assume that he knew of the practice and custom of the passengers and employees of going out on the platform before the train stopped. If the plaintiff knew this, he could assume that the defendant's employees in charge of the train also

knew of this practice, and the plaintiff also had the right to assume that those in charge of the train would not unnecessarily endanger passengers and employees who might be on the platform or steps of the coach by negligently causing the train to suddenly lurch or jerk. All of these matters might properly have been considered by the jury in determining whether the plaintiff failed to use due care for his own safety and whether such failure was a contributory cause of his injuries * * *

"In our consideration of this question [of contributory negligence] we must bear in mind that failure of the plaintiff to anticipate and guard against a sudden jerk caused by negligence of the defendant would not constitute negligence on plaintiff's part."

We contend that these contradictory decisions cannot be justified. There was no active inducement or encouragement of the custom in the *Fiedler* case. No one directed Fiedler to go onto the platform; he went there entirely of his own volition, in reliance on the practice and custom, as did petitioner in this case. And like petitioner, he would have been in no real danger as he stood on the step grasping the handhold except for the negligent operation of the train. The Court in the *Fiedler* case evidently concluded that the railroad's failure to object to the custom established plaintiff's right to rely on it. The trainmen's failure to object, in the instant case, is not even mentioned by the Court. If it was the Court of Appeals' belief that inducement is a prerequisite to admissibility of proof of the custom, then the Court must have concluded that failure to object proved inducement in the *Fiedler* case. It must equally have done so in our case.

If Fiedler, because of the custom, had no reason to anticipate a sudden jerk or lurch of the train, then pe-

titioner here, because of the custom, had no reason to anticipate a sudden violent acceleration. If the question of contributory negligence became a question for the jury in the *Fiedler* case, then manifestly it became a question for the jury in this case.

The Court of Appeals erred in holding as a matter of law that there was no evidence of wilful and wanton conduct on the part of respondent.

Three trial judges previously had submitted this issue to the jury. The first two juries found the railroad guilty of wilful and wanton conduct, and the third disagreed on this question. Can it now be said that no reasonable man could have so found? The Court of Appeals so held, without discussion in the opinion.

Respondent's operating rule 940 (R. 95) required its trainmen to take positions on the coach steps on the platform side when its train started from the station. The custom likewise dictated such conduct. Had they done so, they could not have failed to see petitioner from the time he reached a point near the top of the stairs until he boarded the train—that is, while he traveled some 60 feet or more—and could readily have forestalled any sudden acceleration in the speed of the train by signaling the fireman who was on the left or platform side of the engine. None of the trainmen were on the coach steps as the train pulled out, and their failure to see petitioner makes it clear that none of them made any attempt, after the train started, to determine whether anyone was boarding even though the custom gave notice of such probability. Because of the custom, however, they were chargeable with knowledge of petitioner's presence on the coach step.

The custom forbade rapid acceleration of the train until the last coach had passed the girder, which was only 10 inches from the passing cars, and the trainmen were chargeable with knowledge that petitioner would rely on it. The sudden rapid acceleration of the speed of the train, when such movement was likely to throw him under its wheels and cause his severe injury or death, was wilful and wanton conduct under the Illinois law.

The essence of the definitions of wilful and wanton conduct approved by the Illinois Supreme Court is that defendant's conduct must exhibit a reckless disregard for the safety of others, or a conscious indifference to consequences. *L. S. and M. S. Ry Co.* v. *Bodemer,* 139 Ill. 596, 606-607, 29 N.E. 692, 695; *Schneiderman* v. *Interstate Transit Lines,* 394 Ill. 569, 583, 69 N.E. 2d 293, 300; *Brown* v. *Illinois Terminal Co.,* 319 Ill. 326, 150 N.E. 242, 244; *Bartolucci* v. *Falletti,* 382 Ill. 168, 174, 46 N.E. 2d 980, 983; *Mower* v. *Williams,* 402 Ill. 486, 490, 84 N.E. 2d 435, 437. Whatever the formula, it is nothing more nor less than reckless conduct.

For more than 50 years the Illinois Supreme Court has held that such recklessness is shown by a failure to discover a danger that could have been discovered by the exercise of ordinary care. *L. S. and M. S. Ry. Co.* v. *Bodemer,* 139 Ill. 596, 606-607, 29 N.E. 692, 695; *Schneiderman* v. *Interstate Transit Lines,* 394 Ill. 569, 583, 69 N.E. 2d 293, 300. The failure to see petitioner as he boarded the train and stood on the step, and the sudden acceleration of the speed of the train while he was in this position, clearly made a case of wilful and wanton conduct under the Illinois law. Again at this point, the Court of Appeals' disregard of the evidence of sudden acceleration, and its rejection of the custom, resulted in its sum-

mary disposition of the question of wilful and wanton conduct.

Conclusion.

It is highly important to a great many litigants that the constitutional function of the jury to pass upon disputed fact questions should be preserved. If this decision is permitted to stand, trial and appellate courts will be further encouraged to substitute their judgment for that of the jury on such questions in close cases where the constitutional safeguard is most needed. The action of the trial judge and the Court of Appeals in this case is an expression of the point of view that in such cases the courts' own ideas of what constitutes due care ought to prevail, and represents a fundamental distrust of the jury system. This decision is one more example of the encroachment of the courts upon the jury's proper function. We respectfully contend that although this Court is very heavily burdened, it should exercise its supervisory powers to repel such encroachment wherever it occurs. Petitioner urges that the writ prayed for in the petition be issued; that the judgment of the Court of Appeals be reversed and the case remanded to the District Court for trial.

Respectfully submitted,

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